Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-813

JOHN ALLEN FAVRO,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

The petitioner, John Allen Favro, respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Court of Appeals of the State of Washington, Division I, in that Court's Docket No. 537-I, which opinion affirmed petitioner's conviction of assault in the first degree, attempted robbery, and assault in the second degree.

I.

OPINION BELOW

The Opinion of Division I of the Court of Appeals of the State of Washington is reprinted in the Appendix to this Petition at Pages A-1—A-6. The Opinion is reported in *State v. Favro,* 5 Wn. App. 311 (1971).

II.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals in this case was rendered on July 12, 1971. Petitioner timely filed a Petition for Rehearing, which Petition for Rehearing was denied by Order entered September 23, 1971. A copy of the Order Denying the Petition for Rehearing is reprinted in the Appendix at Page A-7.

Petitioner timely filed a Petition for Review to the Supreme Court of the State of Washington. That Petition for Review was denied on November 23, 1971. The Order Denying Petition for Review is reprinted in the Appendix at Page A-8.

The jurisdiction of this Court in invoked under 28 U.S.C. §1257(3).

III.

QUESTIONS PRESENTED

1. Whether the Sixth Amendment to the United States Constitution made applicable to states by the Fourteenth Amendment grants an accused the right to counsel at a critical part of a lineup where the accused is displayed for identification purposes—namely, that point in the lineup when the witness makes an identification?

2. Whether law enforcement officials violate the Fourth and Fourteenth Amendments to the United States Constitution by making an arrest without a warrant when such law enforcement officials are not faced with an emergent situation and have ample opportunity to obtain advance

judicial approval of the arrest through the warrant procedure?[1]

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION, SECTION 1

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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1. If certiorari is granted and if this Court determines that an arrest without a warrant is proper even when there is ample time to obtain a warrant, then petitioner would urge the subsidiary question as follows: Whether the probable cause necessary to justify a warrantless arrest may be supplied by information allegedly obtained from informants, whose names the police will not divulge, which informants had no personal testimonial knowledge which would implicate the person arrested —i.e., can probable cause be supplied by rumors and hearsay from unnamed informants.

V.

STATEMENT OF THE CASE

A. The Lineup and the Testimony At Trial

On October 12, 1968 at about 9:30 p.m., Emil Drovetto, a member of the Seattle Police Department, entered a grocery store at 4107 Roosevelt Way in Seattle, Washington. Officer Drovetto sat down in the back room of the store with his friend, Mr. Vito Rosi, the store owner (St. 146, 147). At approximately 9:45 p.m., two armed white males entered the store and attempted a robbery. In the resulting melee, Officer Drovetto was shot and seriously wounded (St. 148). Both of the males ran out of the premises and escaped immediate apprehension. Two young women, Susan Thompson and Joan Pope, were at the entrance to the grocery store and saw the men flee (St. 194-196, 200-204).

Each of the four witnesses (except Mr. Rosi, who did not get a good look at the men) described the two assailants in similar terms. One of the males was described as significantly taller than the other (about 6'1" or 6'2") with bushy, hippie-type hair and wearing a leather jacket and muffler. The shorter assailant (about 5'10") was described as having hair of more normal length (St. 147, 196).

Gary Noble, a white male, was arrested for the crime on the morning of October 19, 1968. Gary Noble was at that time 17 years old and approximately 6'4½" in height (St. 381, 394). His hair was approximately 12 inches long and was worn puffed up on top (St. 362). He owned a brown suede leather jacket and a long muffler or scarf (St. 363, Ex. 42). He was questioned by the police and confessed to the crime on October 21, 1968 (St. 373).

Petitioner Favro is white. He, like Noble, was approximately 6'4½" tall when the crime was committed and 17 years of age. His hair was relatively straight and somewhat long. Petitioner sometimes wore his hair pushed up high on his head (St. 296).

Mr. Rosi did not at any time identify the petitioner as one of the assailants. The witness, Joan Pope, testified that petitioner did not resemble either of the assailants (St. 200). Miss Thompson did not identify petitioner (St. 203, 205). Officer Drovetto was unable to positively identify petitioner Favro from photographs shown to him approximately three days after the assault (St. 130, 131).

On October 25, 1968 a line-up was held at University Hospital (St. 135). Petitioner Favro, Gary Noble and several police cadets were placed in that line-up which consisted of a total of six or seven men (St. 134). Officer Drovetto was wheeled into the room where the line-up was taking place. Petitioner Favro had been arrested a few days prior to the line-up. Gary Noble had already confessed. *Officer Drovetto had been instructed by police officers with knowledge of these facts to refrain from making any identification until he returned to his room* (St. 135). While observing the individuals in the line-up, Officer Drovetto asked to be wheeled closer to get a better look (St. 135). At no time during the line-up did he identify anyone, Petitioner Favro's attorney[2] was present where the line-up was being conducted. When Officer Drovetto was wheeled out without making an identification, petitioner's attorney asked the officer "What did he say?" (St. 10). Petitioner's attorney was then advised that the police

2. Present counsel did not represent petitioner in the trial and pretrial proceedings.

officers were going to Officer Drovetto's room to talk to him. Petitioner's attorney objected to this procedure, saying that it was "not right" and that Officer Drovetto should make his identification at the line-up in the presence of petitioner's counsel (St. 11).

Fifteen minutes after the line-up and in the presence of Seattle Police officers, Officer Drovetto filled out a line-up identification sheet (St. 138, Ex. 26). Officer Drovetto signed this sheet in such a way as to indicate that he positively identified Numbers 4 and 5 in the line-up. Number 4 was a police cadet. Number 5 was petitioner Favro. Officer Drovetto did not identify the admitted participant in the crime—Gary Noble (St. 141). The Seattle Police officers had no need for Gary Noble's identification as he had already confessed.

The petitioner testified that he was home on the evening of October 12, 1968 at the time the crime was committed and throughout the whole night (St. 293). He stated that he had been in the store in question about two years before the robbery (St. 297). The petitioner's mother, father, brother and girl friend, all verified petitioner's presence at home during the evening when this crime occurred (St. 321-352).

Gary Noble testified that he was one of the individuals who committed the crime for which he was then incarcerated in the State Penitentiary at Walla Walla. He testified that his accomplice was a white male whose name was "Skip" (St. 362, 363). Noble further testified that his accomplice was about 5'10" tall—approximately 6 inches shorter than Noble and petitioner Favro (St. 362-371).

Petitioner Favro's conviction was based upon circumstantial evidence and an in-court identification of petitioner by Officer Drovetto (St. 117)—an identification Officer Drovetto could not make until the secret meeting with his fellow officers during the line-up on October 25, 1968.

The circumstancial evidence included testimony that a partial palm print on the door purportedly matched that of petitioner Favro (St. 242-253). Added to this was the circumstantial evidence that Gary Noble and petitioner Favro knew each other and associated with each other (St. 300). Circumstantial evidence in support of petitioner's innocence included petitioner's testimony that petitioner had been in the grocery store prior to the date of the robbery. He thought it was two years earlier (St. 297). There was no testimony as to how long a palm print might remain on a door. Petitioner also made an effort to show that a partial palm print was a less reliable means of identification than a fingerprint (St. 263-269, 275, 276).

B. Circumstances of Petitioner's Arrest

The line-up and the palm and fingerprinting of petitioner were a product of petitioner's arrest, the propriety of which is here being questioned. Petitioner was arrested at 9:30 p.m. on Tuesday, October 22, 1968. The police decision to arrest petitioner Favro was made on Monday, October 21, 1968 (St. 18-19). The arrest was made without a warrant. As the Court of Appeals noted:

> "There was sufficient time to obtain a warrant for the arrest of Mr. Favro and the record is void of any reason for the failure to do so." (Opin., p. A-5)

A contingent of approximately twenty police officers were in and surrounding petitioner's home at the time of his

arrest. Petitioner was in bed (St. 391, 393, 396). A Seattle police officer who was one of respondent's first witnesses admitted that there was sufficient time to present the information allegedly in their possession to a magistrate and seek an arrest warrant (St. 19).

Seattle Police Officer DeBoer testified at the trial that the warrantless arrest was based upon knowledge received from informants. Officer DeBoer became involved in the investigation in the afternoon of October 14, 1968 (St. 15). He knew petitioner Favro and Gary Noble and knew that they knew each other (St. 15-17). Officer DeBoer testified that he contacted four informants whom he had known over a period of about three to five years (St. 16). He testified that these informants were reliable and that information that they had given him in the past had been correct. He testified that one of the informants told him that petitioner Favro was one of the individuals who robbed the grocery store and shot the policeman. Another informant allegedly told him that a .45 caliber automatic left at the scene had been obtained earlier in the evening by someone (St. 17). Officer DeBoer further testified that a girl friend of Gary Noble told him that Gary Noble told her that Noble and petitioner Favro had gotten into some kind of trouble in the North end and that "someone had gotten hurt" (St. 18) and that Favro had been shot (St. 21). (The arresting officers discovered Favro was free of any gunshot wound.) The alleged conversation with Noble's girl friend was on October 21, 1968 (St. 19). Officer DeBoer did not know what *all four* of the informants based their information upon. One of them allegedly based the information on a conversation with petitioner Favro. None of them purported to have any direct knowledge of the

robbery and assault. Counsel for respondent indicated that any testimony of the informants "would undoubtedly be considered hearsay" to which the court responded: "Certainly" (St. 22).

The trial court refused to require the State to divulge the names of the alleged informants (St. 23, 24). The trial court also denied petitioner's motion to suppress the in-court identification by Officer Drovetto and the palm print comparison testimony (St. 3-51).

VI.

METHOD FEDERAL QUESTIONS WERE RAISED IN STATE COURT

Both of the questions presented for review were raised in the State trial court by a Motion to Suppress the in-court identifications by Officer Drovetto and the palmprint comparison testimony (App. p. A-2). In addition, petitioner's trial attorney objected to the line-up procedure at the time of the line-up (St. 3-51).

Both of the questions presented for review were raised by way of Assignments of Error and argument in the Court of Appeals of the State of Washington (see Brief of Appellant, pp. 5-8 and Reply and Supplemental Brief of Appellant, pp. 9-14 and 15-19).

Both of the questions presented for review were raised in the Supreme Court of the State of Washington in petitioner's Petition for Review directed to that court (see Petition for Review, pp. 7-11).

Pertinent portions of the trial court record; the Assignments of Error in appellant's brief to the Court of Appeals

of the State of Washington; parts of the Reply and Supplemental Brief of Appellant in the Court of Appeals of the State of Washington; and the Issues of Law Involved section of Petitioner's Petition for Review to the Supreme Court of the State of Washington are reprinted in the Appendix at Pages A-9—A-12.

VII.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Decision on the Lineup Question Is One of Substance and Involves An Issue Which Has Not Been Determined by This Court

The Court of Appeals of the State of Washington held that an accused's right to counsel at a line-up where he is to be displayed for identification purposes does not include the right to have counsel present at the critical part of the line-up—namely, at that point in the line-up when the witness makes an identification. This precise issue has never been decided by this court.

2. The Lineup Issue Raised Here by Petitioner Should Be Decided by This Court in Order to Insure Uniformity of Decision Throughout the Various States on This Important Federal Issue

The decision of the Court of Appeals of the State of Washington is contrary to the decision reached by the only other appellate court which has considered the issue. The California court, presented with the identical question, reached a different conclusion in a four to three decision in *People v. Williams*, 92 Cal. Rep. 6, 478 P.2d 941 (1971).

3. The Court of Appeals Has Decided the Lineup Issue In a Way Which Is Probably Not In Accord With Applicable Decisions of This Court

See *Wade v. United States,* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S. Ct. 1951 (1967); and *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed.2d 1199, 87 S. Ct. 1967 (1967).

In *Wade v. United States, supra,* this court stressed heavily:

> ". . . the suggestibility inherent in the context of the pre-trial identification." (p. 235)

This court noted that the suggestibility problem was particularly acute when the witness was also the victim as in the case at bar:

> "The impediments to an objective observation are increased when the victim is the witness." (p. 230)

This court in *Wade, supra,* quoted with approval the following passage from a comprehensive study on the identification procedure:

> "The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief preoccupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . ." (p. 235, quote from Williams and Hammelmann, Identification Parades, Part I [1963] Crim. Law Rev. 479, 483)

Cross-examination of the persons at the line-up is not a substitute for presence of counsel:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect

> pre-trial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witness against him, ... and even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eye witness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pre-trial confrontation, with the state aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" (pp. 235, 236, *Wade, supra*)

In the case at bar, there has been no suggestion made that any legitimate police purpose[3] would have been frustrated by permitting petitioner's counsel to be present at the moment of identification. There is nothing in the record to suggest, and the State has never suggested, that the presence of counsel would have been in any way detrimental to the health of Officer Drovetto. The possibility of intentional or unintentional suggestion to Officer Drovetto is glaringly present. He did not identify Gary Noble. Noble had already confessed so the police did not need any identification testimony to convict him. He did identify

3. Petitioner does not assert that this Court's lineup cases requires the presence of the accused's attorney every time a police officer shows photographs to a possible witness while investigating a crime. See *Simmons v. U.S.*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). Nor is petitioner here arguing that the police denied to him his constitutional rights when the police showed photographs of a number of persons including the petitioner to Officer Drovetto and others.

petitioner Favro who steadfastly denied any implication in the crime—an identification the police sorely needed to buttress their case against petitioner Favro (the palm print comparison had not been made at this time). Officer Drovetto's pre-line-up description of the two men who committed the crime indicated that there was one tall man and one short man invoved in that crime. The tall man, Gary Noble (6'4½") had already confessed to the crime, leaving only the short man yet to be identified. Petitioner Favro, 6'4½" tall, did not fit the description of the short man.

All of the possibilities for witting or unwitting suggestion at the time of identification noted in *Wade, supra,* were present at the time of Officer Drovetto's purported identification of petitioner Favro. If anything, the case before this court is stronger than the *Wade* case. The officers obtaining the identification in the case at bar were investigating a near fatal shooting of one of their own—a fellow police officer. There was no conceivably legitimate reason for excluding petitioner's counsel from the identification portion of the line-up. This action by the police clearly violated petitioner's rights under the United States Constitution as defined in *Wade* and the cases companion to it.

The in-trial identification of the accused should have been excluded. The prosecution did not prove that the in-court identification by Officer Drovetto had an origin independent of the line-up and that the identification was not obtained by "exploitation of that illegality [but] instead by means sufficiently distinguishable to be purged of the primary taint." *Wade, supra,* page 241. In the case at bar,

the prosecution not only made no showing that the in-court identification by Officer Drovetto had an origin independent of the line-up, the showing that was made indicated that the in-court identification was largely dependent upon that line-up. Under these circumstances, the in-court identification should have been excluded on the strength of this court's decisions in *Wade v. United States, supra; Gilbert v. California, supra;* and *Stovall v. Denno, supra.*

4. The Decision of the Court of Appeals of the State of Washington on the Warrantless Arrest Question Was Not in Accord with Applicable Decisions of This Court

An arrest without a warrant is justified only when it is not practical to obtain advance judicial approval of the arrest through the warrant procedure. Here there was ample opportunity to obtain an arrest warrant. Petitioner was not fleeing; the police knew where he lived; and there was ample time to approach a court in an effort to obtain a warrant.

The Fourth Amendment to the United States Constitution provides in part as follows:

> "The right of the people to be secure in their persons [and] houses, . . . against unreasonable . . . seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment and the decisions of this court draw no distinction between arrests and searches insofar as warrant requirements are concerned. In 1948, this court held in two decisions that police officers had to obtain

warrants whenever it was feasible to do so. *Trupiano v. U.S.*, 334 U.S. 699, 92 L.Ed. 1663, 68 S. Ct. 191 (1948), and *McDonald v. U.S.*, 335 U.S. 451, 93 L.Ed. 153, 69 S. Ct. 191 (1948). In the *McDonald* case, this court stated at page 454 as follows:

> "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances . . . We will not assume that where a defendant has been under surveillance for months, no search warrant could have been obtained . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of a home."

The subsequent case of *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653, 70 S. Ct. 430 (1950), was interpreted by some as a departure from *Trupiano, supra*, and *McDonald, surpra*. This was either a misinterpretation of *Rabinowitz* or experience indicated to this court that it should return to its original position on warrantless arrests, for in *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed.2d 142, 85 S. Ct. 223 (1964), this court again expressed distrust of warrantless arrests:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after the event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." (p. 96)

The reference in *Beck* to hindsight judgment appears to be a gentle way of expressing concern about the reliability of

evidence upon which such hindsight judgments of probable cause are based. (In the case at bar, the police were not forced to justify their warrantless arrest until some 17 months after that arrest.)

Distrust of after-the-fact justifications for arrests has led this court to adopt the rule in warrant cases, that a decision as to whether a warrant was properly issued must be based exclusively on the record made at the time the warrant was sought. The prosecution is not allowed to show additional information which the prosecution contends was within the knowledge of the arresting officer which was not made a part of the record at the time the warrant for arrest was sought. *Giordenello v. U.S.*, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S. Ct. 1245 (1958); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S. Ct. 1509 (1964), and *Spinelli v. U.S.*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S. Ct. 584 (1969).

If a police officer *who has ample opportunity to obtain an arrest warrant* can constitutionally be permitted to make a warrantless arrest, there would never be a need for an arrest warrant. In fact, the officer would be penalized for obtaining one. With a warrant, the arrest might be justified only by the evidence presented to the magistrate when the warrant was obtained. Without a warrant, the testimony in support of that arrest would know no bounds. While the law may observe the rule that evidence obtained after an arrest cannot be used to justify it, there is no physical law which regulates the after-the-fact recollection of a police officer attempting to justify a warrantless arrest.

This court has in 1967, 1968 and in 1969 reiterated the rule that the police must whenever practicable obtain war-

wants. *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S. Ct. 507 (1967); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct. 1868 (1968); *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676, 89 S. Ct. 1394 (1969); and *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969).

In *Katz*, this court stated at Page 357 as follows:

> ". . . searches conducted outside the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." [Here the Court cited various vehicle search cases as illustrative of those situations where an arresting officer finds it impractical to obtain a warrant.] (Emphasis supplied)

In *Terry v. Ohio, supra*, this court stated:

> "If this case involved police conduct subject to the warrant clause of the Fourth Amendment, we would have to ascertain whether 'probable cause existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. . . ."

In *Davis v. Mississippi, supra*, this court stated at Page 681 as follows:

> ". . . The general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context."

In *Chimel v. California, supra*, this court again reaffirmed the rule here advanced by petitioner:

> "Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking an exemption from the requirement to show the need for it . . . The police

must, whenever practicable, obtain advance judicial approval of *searches and seizures* through the warrant procedure." (Emphasis supplied)

We are not here dealing with the kind of a situation where it is impracticable to obtain a warrant. There is nothing in the circumstances of the arrest of petitioner Favro to indicate he was fleeing. (In fact, he was at home in bed!) The police officer who testified as to probable cause indicated he would have sought a warrant had he been in charge of the investigation. In fact, the police had one full court day to obtain a warrant after they had made up their minds to arrest the petitioner. Petitioner respectfully submits that his arrest was unlawful because the police, with ample opportunity to obtain an arrest warrant, took the matter into their own hands and bypassed the courts in order to make that arrest. The whole thing smacks of the idea that the police officers arrested on suspicion rather than probable cause hoping to later obtain sufficient evidence of probable cause to justify the arrest of petitioner Favro should they be required to do so. The fact that the injured victim was a fellow police officer does not justify this kind of departure from established constitutional principles.

VIII.

CONCLUSION

For the reasons advanced herein, petitioner's conviction should not be allowed to stand and his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MURRAY B. GUTERSON
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*, v. JOHN ALLEN FAVRO, *Appellant*.	No. 537-I Division I, Panel II Filed July 12, 1971

FARRIS, A. C. J.—On October 12, 1968, at approximately 9:30 p.m., Emil Drovetto, an off-duty Seattle police officer, entered the grocery store of a friend in Seattle. Approximately 15 minutes thereafter, he was shot and seriously wounded by one of two armed men who entered the store and attempted a robbery. Both men ran from the scene and escaped immediate apprehension leaving behind a .45 calibre automatic pistol. Mr. Favro, alleged to be one of the assailants, was arrested while at his house and in bed on October 22, 1968. No warrant was obtained for his arrest. Fingerprints and palmprints of Mr. Favro were taken by the police following the arrest. On October 25, 1968, Mr. Favro along with Gary Noble who confessed to his role in the crime and five other men, all police cadets, were placed in a line-up. Officer Drovetto observed the men in the line-up but made no identification at that time. Fifteen minutes after the line-up and in the presence of Seattle police officers, but out of the presence of Mr. Favro's attorney, Officer Drovetto filled out a line-up identification sheet. Two men were identified: Mr. Favro and a police cadet.

Mr. Favro appeals from his conviction following a jury trial on a three-count information charging him with

assault in the first degree, attempted robbery and assault in the second degree. Error is assigned to the failure of the trial court to suppress the identification testimony of Officer Drovetto, the fingerprint evidence and the in-court identification of Mr. Favro. Mr. Favro also urges the court to find that his arrest was unlawful and in violation of the Fourth and Fourteenth Amendments of the United States Constitution because (1) the arrest was made without a warrant and the state failed to establish that it was not practical to obtain advance judicial approval of the arrest through warrant procedure and (2) in any event, the arrest was made without probable cause. Error is further assigned to the giving of instruction 19.[1]

The accused has a right to have counsel present at a line-up proceeding. *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967).

> [A] post-indictment pretrail lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment

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1. "I instruct you that evidence may be of two kinds, direct or circumstantial. Direct evidence relates directly to factual questions and is produced by witnesses testifying directly to factual questions and is produced by witnesses testifying directly from their personal observation. Circumstantial evidence relates to facts and circumstances from which the jury may infer other or connected facts which usually and reasonably followed according to the common experience of mankind.

"Circumstantial evidence may be properly considered by the jury. Its value and weight are to be determined from its character and nature and from its relation to all of the other facts which the jury finds to be otherwise established by the other evidence in the case.

"If, upon consideration of the whole case, you are satisfied beyond a reasonable [*sic*] doubt of the guilt of any defendant, it does not matter whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the amount of proof required for conviction."

> right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.

Gilbert v. California, 388 U.S. 263, 272, 18 L.Ed.2d 1178, 87 S. Ct. 1951 (1967).

Mr. Favro was represented by counsel at the line-up who described the proceeding and concluded, "Up to this point, I thought the line-up was a fine line-up, just perfect." His objection was to the identification of the suspect out of his presence following the line-up. It is urged that the identification is a part of the line-up and the line-up is therefore not completed until the identification is made. We disagree. While it may be good procedure to identify the accused at the line-up, identification follows the line-up. The purpose of counsel at the line-up is to prevent impermissible suggestiveness or influence at the line-up proceeding. Mr. Favro argues that the police might improperly assist the eyewitness in the identification following the line-up. This unfortunate possibility is present throughout the pretrial proceedings up to the time of in-court testimony by the eyewitness. Skillful cross-examination is the remedy for such purported misconduct. To hold otherwise is to require the presence of counsel whenever a witness who will testify about the identity of the accused is interrogated by the police. The possibility of suggestiveness, either intentionally or unintentionally is always present in any such interrogation. Counsel for the accused is a silent observer at the proceedings who can later recall his observations for purposes of cross-examination and act in the capacity of a witness to what transpired. The goal is to detect any unfairness in the confrontation between the witness and the accused and to insure that any suggestion

made at that time by the law enforcement officer, either intentionally or unintentionally, is observed. The basis for the requirement of the presence of counsel is the *presence* of the accused when confronted by the witness or witnesses.

The California court, presented with the identical question, reached a different conclusion. We agree with the dissent:

> Counsel's right to be present at a lineup is dependent upon the presence of the accused at the lineup. The accused, at a critical stage of criminal proceedings, cannot remain unrepresented by counsel. Once the police investigation departs from the accused's presence, then neither he nor his counsel has any right of attendance or observation. In the instant case, counsel was properly present during the confrontation of this defendant and witnesses at the lineup. Once the physical confrontation terminated and interrogation of a prospective witness outside the presence of defendant began, the right of counsel to be present ceased.

People v. Williams, 92 Cal. Rptr. 6, 11, 478 P.2d 941 (1971).[2]

The trier of fact, advised that counsel for the accused was present at the line-up and that the identification by the witness was made subsequently and out of his presence will of necessity consider the possible reasons for that procedure as suggested by counsel in his skillful cross-examination and closing argument. We cannot say that this does not satisfy the right to counsel as guaranteed by the Sixth Amendment of the United States Constitution.

In *State v. Cerny*, 78 W.D.2d 871, 480 P.2d 199 (1971) the accused was represented by counsel at the line-up

2. The California court divided 4 to 3 on the question.

where photographs were taken. After the line-up, the photographs were shown to a witness who did not attend the line-up. The appellant there contended that he was denied his Sixth Amendment right to counsel by the subsequent display of photographs to the witnesses. The court in disagreeing, stated:

> Additionally, and most significantly, we are convinced that any possible impropriety which might occur during such exhibition of lineup photographs to witnesses, could be fully uncovered by appellant's counsel during his cross-examination of those witnesses.

State v. Cerny, supra at 879.

There was sufficient time to obtain a warrant for the arrest of Mr. Favro and the record is void of any reason for the failure to do so. Nevertheless, it is established that arrest can be made for a felony in the absence of a warrant if there is probable cause for the arrest.

> A law officer may lawfully arrest without a warrant if he has probable cause to believe that the person he arrests has committed a felony.

State v. Isham, 1 Wn. App. 415, 418, 461 P.2d 569 (1969). *See also State v. Darst*, 65 Wn.2d 808, 399 P.2d 618 (1965); *State v. Mason*, 41 Wn. 2d 746, 252 P.2d 298 (1953).

Here the trial court found that there was probable cause for arrest based upon the information supplied by reliable informants and other information revealed by the police investigation. The record supports this finding which was conceded by trial counsel. It will not be disturbed on appeal.

Mr. Favro complains because the identity of the informant was not revealed. Here as in *State v. Haugen*,

3 Wn. App. 572, 573, 476 P.2d 132 (1970).

> [Appellant] neither showed nor alleged circumstances which required disclosure of the informant's name. In the absence of such a showing, disclosure of the informant's name is not required, nor is it incumbent upon the state to show why such disclosure should not be made.

Mr. Favro's handprint, taken after his arrest, matched a handprint in blood of Officer Drovetto's blood type, found at the scene. Since the arrest was proper, that evidence was properly introduced.

Mr. Favro finally assigns error to the giving of instruction 19 without the additional language:

> [I]n order to convict on circumstantial evidence alone, the evidence should be consistent with the guilt of the defendant and inconsistent with any reasonable hypothesis of innocence.

It is error to refuse to instruct on the "hypothesis of innocence" doctrine where the case made by the state is based solely on circumstantial evidence. *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967). However, here there is direct evidence of the accused's guilt in the testimony of one of the victims, coupled with recovery of physical evidence and the circumstantial evidence of the palm print identified as Mr. Favro's: It was not error to give instruction 19. *See State v. Cadena*, 74 Wn.2d 185, 443 P.2d 826 (1968).

Affirmed.

s/ FARRIS, A.C.J.

WE CONCUR:

s/ JAMES, J.

s/ SWANSON, J.

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,* v. JOHN ALLEN FAVRO, *Appellant.*	No. 537-I ORDER DENYING PETITION FOR REHEARING

The Court having considered the appellant's petition for a rehearing herein, Now, therefore

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 23 day of September, 1971.

By the Court:

s/ JEROME FARRIS
Acting Chief Judge

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,* v. JOHN ALLEN FAVRO, *Petitioner.*	No. 42158 ORDER DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause,

It is ordered that the petition be and it is hereby denied.

Dated this 23rd day of November, 1971.

By the Court:

s/ ORRIS L. HAMILTON
Chief Justice

APPENDIX D

PORTIONS OF RECORD BELOW INDICATING METHOD FEDERAL QUESTIONS WERE RAISED IN STATE COURT

A. Portion of Motion to Suppress Presented Prior to Petitioner's Trial

"Comes now the defendant JOHN ALLEN FAVRO, and moves, through his attorneys of record—the undersigned, to suppress the palm print evidence identified as No. 8. Door-Side A68-44757 Ev. 26709 G.I., the Line-up or Show up on October 25, 1968 at 12:45 P.M. and all evidence pertaining thereto, and all other evidence real or otherwise, found, observed, heard etc. as a direct result of and subsequent to the arrest of defendant Favro at his residence on the 21st day of October, 1968.

"This motion is based on the arrest and detention of defendant Favro without probable cause as set forth in *Davis v. Mississippi*, 22 L.Ed.2d 676, April 22, 1969. The further basis as to the line-up, the fact that the attorneys of defendant Favro were not permitted to see or be present during the full line-up procedure."

B. Record in Court of Appeals of the State of Washington

1. Brief of Appellant; Assignment of Error No. 1:

"The trial court erred in failing to grant appellant's motion to suppress evidence" (from p. 5)

2. Portions of Reply and Supplemental Brief of Appellant:

"III. REPLY AND SUPPLEMENTAL ARGUMENT ON ASSIGNMENTS OF ERROR

"1. The Trial Court Erred in Failing to Grant Ap-

pellant's Motion to Suppress Evidence (Assignment of Error No. 1)

The argument in support of this Assignment of Error can be divided into two main sub-categories as follows:

a. The identification testimony of Officer Drovetto should have been suppressed as the pre-trial line-up was conducted partially in absence of counsel in violation of the Sixth Amendment of the Constitution of the United States made applicable to the State by the Fourteenth Amendment (see pp. 7, 8 of Appellant's Brief and p. 5 of Respondent's Brief).

"b. The Fingerprint Evidence and the In-Court Identification of Appellant facilitated by a post-arrest lineup should be suppressed as products of an unlawful arrest in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States (Brief of Appellant, pp. 5, 6; Brief of Respondent, pp. 2-4). (from pp. 8, 9)

"Evidence obtained as a result of an unlawful arrest or search is inadmissible. Thus, if Appellant Favro was unlawfully arrested, the fingerprint evidence and the identification testimony of Officer Drovetto is inadmissible. In *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676, 89 S. Ct. 1394 (1969), the Supreme Court held that fingerprint evidence was no exception to the rule that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. Respondent does not question this rule of exclusion (Brief of Respondent, pp. 1-5) and Appellant will direct no further argument toward the exclusionary consequences of an unlawful arrest.

"The arrest of Appellant Favro was unlawful and in violation of the Fourth and Fourteenth Amendments to the United States Constitution for two reasons, as follows:

"1. The arrest was made without a warrant and

the state failed to establish what has now been held absolutely crucial, namely, that it was not practical to obtain advance judicial approval of the arrest through the warrant procedure.

"2. Even if this jurisdiction should reject the rule of 1. above and hold that warrantless arrests can be justified any time the circumstances establish probable cause, still the arrest here was unlawful as it was made without the probable cause for an arrest without a warrant required by the Fourth and Fourteenth Amendments to the United States Constitution. (from pp. 14, 15)

C. Record in Supreme Court of the State of Washington: Portions of Petitioner's Petition for Review

"III. ISSUES OF LAW INVOLVED.

"The Opinion of Division I of the Court of Appeals lets stand the conviction of the petitioner, John Allen Favro, of the crimes of assault in the first degree. attempted robbery, and assault in the second degree. In so doing, the Court held:

"1. That an accused is not entitled to counsel at a critical part of a line-up where he is displayed for identification purposes—namely, that point in the lineup when the witness makes an identification.

"2. That law enforcement officials may make an arrest without a warrant even though those law enforcement officials have ample opportunity to obtain advance judicial approval of the arrest through the warrant procedure.

"3. The probable cause necessary to justify a warrantless arrest may be supplied by information allegedly obtained from informants, whose names the police will not divulge, which informants had no personal testimonial knowledge which would implicate the person arrested.

"4. An accused is not entitled to the 'hypothesis of innocence' circumstantial evidence instruction where

there is direct evidence of the accused's guilt even though that direct evidence has been substantially challenged and even though circumstantial evidence played a significant part in the determination of the jury.

"Petitioner respectfully submits that the decision of the Court of Appeals on each of the matters outlined above was in error for the reasons indicated hereafter." (from pp. 7, 8)